

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

MICHAEL MONTGOMERY,

Plaintiff,

vs.

WAL-MART STORES, INC.;  
KINDERHOOK INDUSTRIES II,  
L.P.; KINDERHOOK INDUSTRIES,  
L.L.C.; KINDERHOOK CAPITAL  
FUND II, L.P.; CRESTWOOD  
HOLDINGS, INC.; BERGAN, L.L.C.;  
JOHN ELMBURG; ROBERT  
ELMBURG; ERIC ELMBURG;  
ROCKY FLICK; HOME DEPOT  
U.S.A., INC.; DOES 1 through 20  
inclusive,

Defendants.

CASE NO. 12CV3057 JLS (DHB)

**ORDER (1) GRANTING MOTIONS  
TO DISMISS; AND, (2) DENYING  
AS MOOT MOTIONS TO STRIKE**

(ECF Nos. 29, 31, 40, 41, and 42)

Presently before the Court are five factually and legally similar motions to dismiss filed by Defendants Robert Elmburg, John Elmburg, Eric Elmburg, Rocky Flick (“Flick”), Bergan, L.L.C. (“Bergan”), and Crestwood Holdings, Inc. (“Crestwood Holdings,” and collectively, “the Oklahoma Defendants”). (ECF Nos. 29, 31, 40, 41, and 42). Also before the Court is Plaintiff Michael Montgomery’s (“Plaintiff,” or “Montgomery”) consolidated response in opposition, (Resp. in Opp’n, ECF No. 51), and the Oklahoma Defendants’ consolidated reply in support, (Reply in Supp., ECF No. 56). A sixth motion to dismiss, (ECF No. 46), was also

1 filed by Defendants Kinderhook Industries II, L.P., Kinderhook Industries, L.L.C.,  
2 and Kinderhook Capital Fund II, L.P., (“the Kinderhook Defendants”), but all case  
3 activity with respect to those parties has been stayed pending finalization of a  
4 settlement agreement.

5 Having considered the parties’ arguments and the law, the Court **GRANTS**  
6 the Oklahoma Defendants’ motions to dismiss. Plaintiff’s Seventh and Ninth Causes  
7 of Action are **DISMISSED WITHOUT PREJUDICE**.

### 8 **BACKGROUND**

9 In this products liability action, Plaintiff, a California resident, has sued  
10 eleven separate defendants allegedly responsible for the distribution and sale of  
11 defective portable gasoline containers designed and manufactured by Blitz U.S.A.,  
12 Inc. (“Blitz”). Plaintiff’s claims arise from a June 20, 2002 accident in which he  
13 suffered severe injuries and burns from the explosion of a Blitz gas container.

14 On May 6, 2011, Plaintiff filed a prior action against Blitz, arising from this  
15 incident. *See Montgomery v. Blitz U.S.A., Inc.*, 11CV999 JLS (DHB). This  
16 litigation was stayed on November 10, 2011 due to Blitz’s filing of a bankruptcy  
17 petition in the U.S. Bankruptcy Court for the District of Delaware. Blitz’s  
18 bankruptcy proceedings remain pending and the prior litigation remains subject to an  
19 automatic stay.

20 On December 24, 2012, Plaintiff filed this lawsuit, targeting retailers of  
21 Blitz’s gas containers, including Wal-Mart Stores, Inc. and Home Depot U.S.A.,  
22 Inc., as well as several other entities related to Blitz. The motions to dismiss  
23 currently pending before the Court involve Plaintiff’s claims against three former  
24 Blitz stockholders, a current Blitz officer, Blitz’s former parent company, and a  
25 company formerly related to Blitz that now manufactures and sells pet products. All  
26 six Defendants reside in Oklahoma. Plaintiff brings no claims against Blitz in the  
27 current action, nor are any of the Oklahoma Defendants named as defendants in the  
28 prior litigation.

1 The Oklahoma Defendants each have an extensive business relationship with  
2 Blitz. Defendant John Elmburg and his wife, or their respective living trusts,  
3 formerly owned a majority interest in Blitz, and their sons, Defendants Robert  
4 Elmburg and Eric Elmburg, each owned a minority interest. In October 2005, the  
5 Elmburgs exchanged their Blitz stock for equal shares of stock in Defendant  
6 Crestwood Holdings, which subsequently served as the parent corporation of Blitz  
7 until September 2007. From October 2005 to September 2007, John Elmburg and  
8 his wife owned a majority interest in Crestwood Holdings, and Robert and Eric  
9 Elmburg each owned a minority interest. Crestwood Holdings then sold all of its  
10 Blitz stock in September 2007 to an unrelated entity, Blitz Acquisitions. The  
11 Elmburgs ceased to have any direct or indirect ownership interest in Blitz at that  
12 time, as did Crestwood Holdings.

13 Defendant Flick is currently the Chief Executive Officer of Blitz and formerly  
14 held the positions of Vice President of Sales & Marketing, Vice President, General  
15 Manager, and President. Flick began his employment with Blitz in 1988 and  
16 remains employed with Blitz to this day.

17 Finally, Defendant Bergan is a manufacturer of pet products that was spun off  
18 from Blitz in October 2006. Following the spinoff, Blitz and Bergan were separate  
19 entities, each owned by the parent company, Crestwood Holdings.

20 Plaintiff alleges that the Elmburgs and Flick were “active participants who  
21 directed and controlled . . . [Blitz’s] decision to sell portable gas containers knowing  
22 the risk posed to consumers” and “strategically used [the named] corporate  
23 defendants as their own to transfer assets in the face of mounting litigation [against  
24 Blitz] in exchange for personal profit.” (Resp. in Opp’n 1–2, ECF No. 51). The  
25 Oklahoma Defendants in turn move to dismiss the claims against them for lack of  
26 personal jurisdiction, failure to state a claim, and lack of standing, and also move to  
27 strike Plaintiff’s request for punitive damages and attorney’s fees.

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## MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION

### 1. Legal Standard

Federal Rule of Civil Procedure 12(b)(2) allows district courts to dismiss an action for lack of personal jurisdiction. “Where defendants move to dismiss a complaint for lack of personal jurisdiction, plaintiffs bear the burden of demonstrating that jurisdiction is appropriate.” *Dole Food Co. Inc. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002). “The court may consider evidence presented in affidavits to assist in its determination and may order discovery on the jurisdictional issues.” *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (citing *Data Disc, Inc. v. Sys. Tech. Ass’n, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). “When a district court acts on the defendant’s motion to dismiss without holding an evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to withstand a motion to dismiss.” *Id.* (citing *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995)); *see also Data Disc*, 557 F.2d at 1285 (“[I]t is necessary only for [the plaintiff] to demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss.”).

“Unless directly contravened, [Plaintiff’s] version of the facts is taken as true, and ‘conflicts between the facts contained in the parties’ affidavits must be resolved in [Plaintiff’s] favor for purposes of deciding whether a prima facie case for personal jurisdiction exists.’” *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003) (citing *Unocal Corp.*, 248 F.3d at 922); *see also Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (“Because the prima facie jurisdictional analysis requires us to accept the plaintiff’s allegations as true, we must adopt [Plaintiff]’s version of events . . .”). A court may not, however, “assume the truth of allegations in a pleading which are contradicted by affidavit.” *Alexander v. Circus Enters., Inc.*, 972 F.2d 261, 262 (9th Cir. 1992) (internal quotations omitted).

California’s long-arm jurisdictional statute permits the exercise of personal

1 jurisdiction so long as it comports with federal due process. *See* Cal. Civ. Proc.  
2 Code § 410.10; *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800–01  
3 (9th Cir. 2004). “For a court to exercise personal jurisdiction over a nonresident  
4 defendant, that defendant must have at least ‘minimum contacts’ with the relevant  
5 forum such that the exercise of jurisdiction ‘does not offend traditional notions of  
6 fair play and substantial justice.’” *Fred Martin Motor*, 374 F.3d at 801 (quoting  
7 *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (internal quotation marks  
8 omitted).

## 9 **2. Analysis**

10 The Oklahoma Defendants move to dismiss the claims against them for lack  
11 of personal jurisdiction.<sup>1</sup> They contend that Plaintiff has failed to allege facts  
12 establishing that they have sufficient contacts with California to satisfy due process.

13 A federal district court may exercise either general or specific personal  
14 jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408,  
15 414–15 (1984). To establish general jurisdiction, a plaintiff must demonstrate that  
16 the defendant has the kind of “continuous and systematic” contacts with the forum  
17 state that “approximate physical presence.” *Bancroft & Masters, Inc. v. Augusta*  
18 *Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). A plaintiff may rely on such factors  
19 as whether the defendant makes sales, solicits, or engages in business in the forum  
20 state, serves the state’s markets, designates an agent for service of process, holds a  
21 license, or is incorporated there. *See id.* A defendant whose contacts with the forum  
22 are substantial, continuous, and systematic is subject to a court’s jurisdiction even if  
23 the suit concerns matters not arising out of his contacts with the forum. *See*  
24 *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114,  
25 1123 (9th Cir. 2002).

26 To establish specific personal jurisdiction, a plaintiff must plead that (1) the  
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28 <sup>1</sup> Bergan is the only one of the Oklahoma Defendants that apparently concedes personal jurisdiction and does not move to dismiss on this ground.

1 defendant has purposefully directed his activities to, or consummated some  
2 transaction with, the forum or a resident thereof; or performed some act by which he  
3 purposefully availed himself of the privilege of conducting activities in the forum,  
4 thereby invoking the benefits and protections of its laws; (2) the claim is one that  
5 arises out of or relates to the defendant's forum-related activities; and (3) the  
6 exercise of jurisdiction comports with notions of fair play and substantial justice.  
7 *Dole Food*, 303 F.3d at 1111.

8 Here, Plaintiff's complaint alleges that the Oklahoma Defendants purposefully  
9 directed their activities toward California by introducing defective gasoline  
10 containers into the stream of commerce with knowledge that doing so would harm  
11 consumers located in California. Plaintiff's theory appears to be that Blitz's sale of  
12 defective gas containers in California establishes personal jurisdiction over the  
13 Oklahoma Defendants because (1) they directly participated in, controlled, or  
14 specifically authorized Blitz's sales of the defective products such that they are  
15 individually liable for tortious conduct, or (2) they operated and utilized Blitz's  
16 corporate entity without regard for corporate formalities, such that the "alter ego," or  
17 "veil-piercing," doctrine should apply.

18 Plaintiff's allegations are insufficient to establish specific jurisdiction,  
19 however, because Plaintiff's claims against the Oklahoma Defendants do not arise  
20 from their alleged forum-related activities. Although Plaintiff maintains in his  
21 opposition that he is suing the Oklahoma Defendants because they injured him by  
22 distributing a defective gasoline container, Plaintiff's complaint in fact alleges only  
23 two causes of action against the Oklahoma Defendants: (1) "Piercing the Corporate  
24 Veil and Joint Enterprise Liability," and (2) "Fraudulent Conveyance." According  
25 to Plaintiff's complaint, these claims arise from the Oklahoma Defendants' alleged  
26 diversion of Blitz's corporate funds and efforts to avoid products liability by abusing  
27 and manipulating Blitz's corporate form—conduct that occurred, if at all, entirely  
28 outside of California. Thus, the relationship between Plaintiff's claims and the

Oklahoma Defendants' forum-related contacts is too tenuous to support specific personal jurisdiction. *See Doe v. Am. Nat. Red Cross*, 112 F.3d 1048, 1051–52 (9th Cir. 1997) (noting that, in the Ninth Circuit, a claim is related to a defendant's forum-related activities if the plaintiff would not have a cause of action “but for” the defendant's contacts with the forum).

Plaintiff's allegations are also insufficient to establish general jurisdiction over the Oklahoma Defendants. The Oklahoma Defendants' alleged participation in, or control over, Blitz's introduction of defective gas containers into the stream of commerce, without more, does not establish the type of “substantial, continuous, and systematic” contacts that approximate physical presence and justify the exercise of general personal jurisdiction. Accordingly, the Court **GRANTS** the motions to dismiss for lack of personal jurisdiction.

## **MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM**

### **1. Legal Standard**

Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the defense that the complaint “fail[s] to state a claim upon which relief can be granted,” generally referred to as a motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil Procedure 8(a), which requires a “short and plain statement of the claim showing that the pleader is entitled to relief.” Although Rule 8 “does not require ‘detailed factual allegations,’ . . . it [does] demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff's obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556



1 U.S. at 677(citing *Twombly*, 550 U.S. at 557).

2 “To survive a motion to dismiss, a complaint must contain sufficient factual  
3 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.*  
4 (quoting *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is  
5 facially plausible when the facts pled “allow[] the court to draw the reasonable  
6 inference that the defendant is liable for the misconduct alleged.” *Id.* (citing  
7 *Twombly*, 550 U.S. at 556). That is not to say that the claim must be probable, but  
8 there must be “more than a sheer possibility that a defendant has acted unlawfully.”  
9 *Id.* Facts “‘merely consistent with’ a defendant’s liability” fall short of a plausible  
10 entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court  
11 need not accept as true “legal conclusions” contained in the complaint. *Id.* This  
12 review requires context-specific analysis involving the Court’s “judicial experience  
13 and common sense.” *Id.* at 678 (citation omitted). “[W]here the well-pleaded facts  
14 do not permit the court to infer more than the mere possibility of misconduct, the  
15 complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to  
16 relief.’” *Id.*

17 Moreover, “for a complaint to be dismissed because the allegations give rise  
18 to an affirmative defense[,] the defense clearly must appear on the face of the  
19 pleading.” *McCalden v. Cal. Library Ass’n*, 955 F.2d 1214, 1219 (9th Cir. 1990).  
20 The Court will grant leave to amend unless it determines that no modified contention  
21 “consistent with the challenged pleading . . . [will] cure the deficiency.” *DeSoto v.*  
22 *Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schriber*  
23 *Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)).

## 24 **2. Analysis**

25 The Oklahoma Defendants also move to dismiss Plaintiff’s Seventh Cause of  
26 Action on the ground that neither California nor Oklahoma law recognizes a  
27 substantive cause of action for “Piercing the Corporate Veil” or “Joint Enterprise  
28 Liability.” They contend that the alter ego, or veil-piercing, doctrine is merely a



1 procedure in which courts disregard the corporate entity in order to impose liability  
2 on stockholders for acts done in the name of the corporation. Similarly, they also  
3 maintain that the doctrine of joint enterprise liability is a procedure for extending  
4 liability, rather than a substantive claim. Accordingly, the Oklahoma Defendants  
5 argue that Plaintiff's failure to allege any substantive tort liability against them or  
6 against Blitz renders the veil-piercing and joint enterprise doctrines irrelevant.

7 Under California law, courts apply a two-part test to determine whether the  
8 alter ego doctrine should be invoked to hold an individual liable for acts of a  
9 corporation. *See Automotriz Del Golfo De California S.A. v. Resnick*, 306 P.2d 1, 3  
10 (Cal. 1957). First, there must be such unity of interest and ownership that the  
11 separate personalities of the corporation and the individual no longer exist. *Id.*  
12 Second, there must be evidence that, if the acts in question are treated as those of the  
13 corporation alone, an inequitable result will follow. *Id.*

14 Numerous factors are relevant to this inquiry, such as the failure to follow  
15 corporate formalities, commingling of corporate assets with personal assets,  
16 diversion of corporate assets for personal use, and failure to provide sufficient  
17 capital to cover risks created through a corporation's activities. *See Associated*  
18 *Vendors, Inc. v. Oakland Meat Co., Inc.*, 26 Cal. Rptr. 806, 813 (Cal. Ct. App.  
19 1963). Nevertheless, no single factor is dispositive, and courts assess the totality of  
20 the circumstances before applying the doctrine. *See Sonora Diamond Corp. v.*  
21 *Superior Court*, 99 Cal. Rptr. 2d 824, 836 (Cal. Ct. App. 2000) (citing *Talbot v.*  
22 *Fresno-Pacific Corp.*, 5 Cal. Rptr. 361, 366 (Cal. Ct. App. 1960)).

23 Similarly, the doctrine of joint enterprise liability is recognized in California  
24 and permits courts to hold one member of a common enterprise liable for the torts of  
25 another member. *See Berg & Berg Enters., LLC v. Sherwood Partners, Inc.*, 32 Cal.  
26 Rptr. 3d 325, 339 (Cal. Ct. App. 2005). The doctrine is applied when one person,  
27 who does not actually commit a tort himself, shares with the immediate tortfeasors  
28 "a common plan or design" in the perpetration of the harm. *Id.*

1 Here, Plaintiff alleges that the Elmburgs and Flick illicitly transferred Blitz's  
2 funds to artificial corporate entities, including Crestwood Holdings and Bergan, to  
3 prevent tort claimants from recovering for their injuries. According to Plaintiff, the  
4 Elmburgs and Flick failed to observe corporate formalities and managed Blitz and its  
5 related entities in such a manner that Blitz's separate corporate identity ceased to  
6 exist.

7 Plaintiff's claim fails, however, because there is no substantive cause of action  
8 for alter ego or joint enterprise liability. The alter ego and joint enterprise doctrines  
9 are procedural mechanisms that allow a tort claimant to recover from an individual,  
10 or a related entity, for harm caused by a corporation; they are not themselves  
11 substantive bases for liability. *See Berg*, 32 Cal. Rptr. 3d at 339. Although Plaintiff  
12 contends in his opposition that he is actually suing the Oklahoma Defendants for  
13 distributing the defective product that injured him, Plaintiff does not allege any torts  
14 or other causes of action against either Blitz or the Oklahoma Defendants that might  
15 serve as a substantive basis for liability. Plaintiff's Seventh Cause of Action thus  
16 appears to be no more than a stand-alone claim for "Piercing the Corporate Veil and  
17 Joint Enterprise Liability." For this reason, the Court **GRANTS** the Oklahoma  
18 Defendants' motion to dismiss the Seventh Cause of Action for failure to state a  
19 claim.

## 20 **MOTIONS TO DISMISS FOR LACK OF STANDING**

### 21 **1. Legal Standard**

22 A party may move to dismiss a claim for lack of standing under Federal Rule  
23 of Civil Procedure 12(b)(1). *See* 5B Charles Alan Wright & Arthur Miller, *Federal*  
24 *Practice and Procedure* § 1350 (3d ed. 2004). "When subject matter jurisdiction is  
25 challenged under Federal Rule of [Civil] Procedure 12(b)(1), the plaintiff has the  
26 burden of proving jurisdiction in order to survive the motion." *Tosco Corp. v.*  
27 *Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001) (abrogated on other  
28 grounds by *Hertz Corp. v. Friend*, 559 U.S. 77 (2010)). "Unless the jurisdictional

1 issue is inextricable from the merits of a case, the court may determine jurisdiction  
 2 on a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) . . . .” *Robinson*  
 3 *v. United States*, 586 F.3d 683, 685 (9th Cir. 2009) (internal citations omitted). “A  
 4 Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the  
 5 challenger asserts that the allegations contained in a complaint are insufficient on  
 6 their face to invoke federal jurisdiction. By contrast, in a factual attack, the  
 7 challenger disputes the truth of the allegations that, by themselves, would otherwise  
 8 invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039  
 9 (9th Cir. 2004).

## 10 **2. Analysis**

11 The Oklahoma Defendants also move to dismiss on the ground that Plaintiff  
 12 lacks standing to bring his Ninth Cause of Action for fraudulent conveyance.<sup>2</sup> They  
 13 maintain that the trustee in Blitz’s bankruptcy has exclusive standing to bring such a  
 14 claim.

15 California law permits creditors to file actions to avoid fraudulent transfers  
 16 made by a debtor after the creditor’s claim arose. *See* Cal. Civ. Code §§ 3439.04,  
 17 3439.05, 3439.07. After a bankruptcy petition has been filed, however, only the  
 18 trustee or debtor-in-possession has standing to assert a fraudulent transfer claim. *See*  
 19 *In re Lockwood*, 414 B.R. 593, 602 (Bankr. N.D. Cal. 2008) (citing *In re Pac. Gas &*  
 20 *Elec. Co.*, 281 B.R. 1, 13 (Bankr. N.D. Cal. 2002). A creditor may not exercise  
 21 control over the fraudulent transfer cause of action absent permission from the  
 22 bankruptcy court or assignment or abandonment of the claim by the trustee. *See id.*

23 Here, Plaintiff appears to concede that the fraudulent transfer claim has not  
 24 been abandoned or assigned and that he needs the bankruptcy court’s permission to  
 25 proceed with his claim. Although Plaintiff contends that the Official Committee of

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26  
 27 <sup>2</sup> The Oklahoma Defendants also contend that Plaintiff lacks standing to bring his  
 28 claim for Piercing the Corporate Veil and Joint Enterprise Liability. As the Court has  
 already granted a motion to dismiss this claim on an alternative basis, the Court will  
 only address the issue of standing with respect to Plaintiff’s fraudulent conveyance  
 claim.

1 Unsecured Creditors in Blitz's bankruptcy has moved for a court order granting  
2 permission to proceed with such claims against the Kinderhook Defendants, Plaintiff  
3 provides no evidence that the bankruptcy court has granted any requested relief.  
4 Accordingly, the Court **GRANTS** the Oklahoma Defendants's motion to dismiss  
5 Plaintiff's fraudulent conveyance claim for lack of standing.

6 **MOTIONS TO STRIKE**

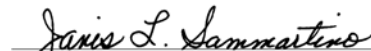
7 As the Court has dismissed both Plaintiff's Seventh and Ninth Causes of  
8 Action—the only claims asserted against the Oklahoma Defendants in this case—the  
9 Court **DENIES AS MOOT** the motions to strike Plaintiff's request for relief in the  
10 form of punitive damages and attorney's fees.

11 **CONCLUSION**

12 For the reasons stated above, the Court **GRANTS** the Oklahoma Defendants'  
13 motions to dismiss, **DENIES AS MOOT** the motions to strike, and **DISMISSES**  
14 **WITHOUT PREJUDICE** Plaintiff's Seventh and Ninth Causes of Action. Plaintiff  
15 may file an amended complaint curing the jurisdictional and substantive deficiencies  
16 noted by the Court within 14 days of the date that this Order is electronically  
17 docketed.

18 **IT IS SO ORDERED.**

19  
20 DATED: September 18, 2013

21   
22 Honorable Janis L. Sammartino  
23 United States District Judge  
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